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91-438

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM A. KROLL,

Petitioner,

vs.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment is applicable to a lawsuit pending in a federal court following a merger wherein the surviving corporation is a state agency?
2. Whether the language of the merger statute of the State of Illinois, Ill.Rev.Stat., ch. 144, par. 28d(d)(4) (1989) was so specific regarding pending lawsuits that the specific stringent language of the waiver standard of Eleventh Amendment Immunity was overwhelmingly implied?

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BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William A. Kroll, prays that a writ of certiorari issue to review the Judgment - With Oral Argument of the United States Court of Appeals For the Seventh Circuit, entered on June 17, 1991. A Petition

for Rehearing in Banc filed by the Petitioner on July 1, 1991, was denied by the United States Court of Appeals For the Seventh Circuit on July 22, 1991. Notice of Issuance of Mandate was issued by the United States Court of Appeals For the Seventh Circuit on July 30, 1991.

OPINION BELOW

The official Opinion of the United States Court of Appeals For the Seventh Circuit, Nos. 89-3414 and 90-1075 entered June 17, 1991, is included in the Appendix as Exhibit A. The denial order of Petitioner's Petition for Rehearing in Banc entered July 22, 1991, by the United States Court of Appeals For the Seventh Circuit is included in the Appendix as Exhibit B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1) pursuant to petition for writ of certiorari in review of judgment entered by the United States Court of Appeals for the Seventh Circuit involving the application of the Eleventh Amendment of the Constitution of the United States.

An official Opinion was issued by the United States Court of Appeals For the Seventh Circuit on June 17, 1991, pursuant to its Judgment entered the same date. A copy of said Judgment is included in the Appendix as Exhibit A-1. The Petitioner sought timely Petition for Rehearing In Banc, before the United States Court of Appeals for the Seventh Circuit, which was denied on July 22, 1991. (See Appendix Exhibit B).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the Constitution of the United States: "The judicial power of the United States shall not be construed to extend any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S.Const. Amend.XI.

2. Special legislation merging the University of Illinois Athletic Association, a not-for-profit corporation, into the Board of Trustees of the University of Illinois, an Illinois Public Corporation, Public Act 86-6, 1989 Ill.Legis.Serv.299, 300-01 (West)(codified at Ill.Rev.Stat., ch.144, par.28d):

> The Board of Trustees of the University of Illinois shall be

> responsible and liable for all the liabilities and obligations of each of the corporations so merged; and any claim existing or action or proceeding pending by or against either of such corporations may be prosecuted to judgment as if such merger had not taken place, or the surviving corporation may be substituted in its place. Neither the rights of the creditors nor any liens upon the property of either of such corporations shall be impaired by such merger.

Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989).

STATEMENT OF THE CASE

On January 6, 1989, Petitioner filed a lawsuit against the University of Illinois Athletic Association, an Illinois not-for-

profit corporation, the Board of Trustees of the University of Illinois, an Illinois Public Corporation and Neale Stoner, in his individual and official capacity as director of the aforesaid Athletic Association.

A motion to dismiss was filed by the Board of Trustees, predicated upon the Eleventh Amendment of the Constitution of the United States, which was allowed on June 13, 1989, with leave to the Petitioner to refile.

On July 18, 1989, Petitioner filed his amended complaint against the Athletic Association and Neale Stoner, including relief under 42 U.S.C., Section 1983, as well as other relief. On June 29, 1989, the State of Illinois enacted a merger statute allowing a merger of the Athletic Association into the Board of Trustees. Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989). On June 30, 1989, the Secretary of State for the State of Illinois

issued a certificate of merger. The Board of Trustees became the surviving corporation and the Athletic Association ceased to exist as a separate entity. The merger statute as applicable provides in its entirety that:

> The Board of Trustees of the University of Illinois shall be responsible and liable for all the liabilities and obligations of each of the corporations so merged; and any claim existing or action or proceeding pending by or against either of such corporations may be prosecuted to judgment as if such merger had not taken place, or the surviving corporation may be substituted in its place. Neither the rights of the creditors nor any liens upon the property of either of such corporations shall be impaired

by such merger.

Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989).

On October 4, 1989, the United States District Court for the Central District of Illinois denied the Board of Trustees' motion to dismiss filed August 16, 1989, pursuant to the Board of Trustees' reassertion of its Eleventh Amendment Immunity (See Appendix - Exhibit C.)

The Board of Trustees thereafter appealed to the United States Court of Appeals for the Seventh Circuit, No. 89-3414. Jurisdiction of the United States Court of Appeals for the Seventh Circuit was conferred by 28 U.S.C., Section 1291, as an interlocutory order based upon the Eleventh Amendment is immediately appealable under Mitchell vs. Forsyth, 472 U.S. 511, 524-30 (1985).

On December 12, 1989, the United States District Court for the Central District of

Illinois issued a supplemental Memorandum of Law and Order discussing its denial of the Board of Trustees' motion to dismiss entered October 4, 1989, regarding the Board of Trustees' reassertion of its Eleventh Amendment Immunity. (See Appendix - Exhibit D)

The Board of Trustees thereafter appealed to the United States Court of Appeals for the Seventh Circuit, No. 90-1075. Jurisdiction of the United States Court of Appeals for the Seventh Circuit was conferred by 28 U.S.C., Section 1291, as an interlocutory order based upon the Eleventh Amendment is immediately appealable under Mitchell vs. Forsyth, 472 U.S. 511, 524-30 (1985).

Thereafter, on June 17, 1991, the United States Court of Appeals for the Seventh Circuit did enter its judgment as to both appeals as consolidated as Nos. 89-3414 and

90-1075, stating:

> On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, REVERSED and REMANDED, with instructions to dismiss the Board (of Trustees) from the suit, the parties shall bear their own costs, in accordance with the opinion of this Court filed this date.

The United States Court of Appeals for the Seventh Circuit issued its opinion on June 17, 1991. Said Court relied on Port Auth. Trans-Hudson Corp. vs. Feeney, 110 S.Ct. 1868, 1872 (1990) and Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 238 (1985) that an Eleventh Amendment Immunity waiver must be "stated by the most express language or by

such overwhelming implication from the text as (will) leave no room for any other reasonable construction." Port Auth. Trans-Hudson Corp. vs. Feeney, 110 S.Ct. at 1873, from Atascadero State Hospital vs. Scanlon, 473 U.S. at 239-40.

On July 1, 1991, Petitioner filed his Petition for Rehearing In Banc, with the United States Court of Appeals for the Seventh Circuit. The Petition reasserted Petitioner's position that the language required for, a state agency, Board of Trustees to waive its Eleventh Amendment Immunity, under the Port Authority and Atascadero decisions, did not apply to the merger statute, Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989), where said merger provided that the Board of Trustees would be liable for all the liabilities of the merged Illinois Athletic Association and any such claim existing may be prosecuted to

judgment against either of such corporations as if the merger had not taken place, or the surviving corporation may be substituted in its place. On July 22, 1991, the United States Court of Appeals for the Seventh Circuit stated that "no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing." And said Court ordered "that the aforesaid petition for rehearing with suggestion for rehearing in banc be, and the same is hereby, DENIED.

In both Port Authority and Atascadero, the issue was whether the state agency in consenting to suits being brought against them included a waiver of the agencies respective Eleventh Amendment Immunity, regarding prospective suits or causes of action.

The United States Court of Appeals for the Seventh Circuit from which this petition

for certiorari is brought has required such specific waiver language to apply to the retroactive cause of action, to the merger statute in question, Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989), that was the claim of the Illinois Athletic Association prior to said merger wherein the Board of Trustees shall be liable after the merger for said claim.

REASONS FOR GRANTING THE WRIT

The Opinion Of The United States Court Of Appeals For the Seventh Circuit Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court Concerning The Application Of The Eleventh Amendment Following A Merger Wherein The Surviving Corporation Is A State

Agency As To A Claim Of The Merged Corporation.

This Petition arises from the United States Court of Appeals For the Seventh Circuit published opinion which reversed the Order of the United States District Court For the Central District Court of Illinois denying Respondent's Motion to Dismiss predicated upon the Eleventh Amendment of the Constitution of the United States.

Petitioner's Complaint had been brought against the University of Illinois Athletic Association an Illinois not-for-profit corporation regarding certain causes of action including requested relief under 42 U.S.C., Section 1983. The Complaint was filed in the United States District Court For the Central District of Illinois.

That the State of Illinois legislature subsequent to these claims against the

Athletic Association passed legislation which effectively merged the Athletic Association into the Board of Trustees of the University of Illinois, an Illinois Public Corporation providing that Board of Trustees "shall be liable for all the liabilities and obligations" of the Athletic Association. Ill.Rev.Stat., ch.144, par.28d(d)(4)(1989). And further that "any claim existing by or against" the Athletic Association "may be prosecuted to judgment as if such merger had not taken place..." Ill.Rev.Stat., ch.144, par.28d(d)(4)(1989).

The essential issue is whether the United States Court of Appeals for the Seventh Circuit appropriately applied the standard to determine waiver of the Eleventh Amendment Immunity to this cause of action. The United States Court of Appeals utilized the stringent requirement articulated in Port Auth. Trans-

Hudson Corp. vs. Feeney, 110 S.Ct. 1868, 1873 (1990) that the waiver of Eleventh Amendment Immunity exists "only where stated by the most express language or by such overwhelming implication...as to "leave no room for any other reasonable construction".

The Port Auth. decision relied heavily upon Atascadero State Hosp. vs. Scanlon, 473 U.S. 234, 238-40 (1985). In Port Auth. the issue was whether the states of New York and New Jersey in consenting to "suits, actions or proceedings" prospectively to the compact created by said states waived their respective Eleventh Amendment Immunity. The United States Supreme Court said no because the language did not specifically consent to be sued in federal court. In Atascadero the question was with regard to prospective lawsuits under the California Constitution (Cal.Const., Art.III, Section 5). The United

States Supreme Court said the language thereof did not specifically state that California would be subject to suit in federal court.

This is a notable and important decision of the United States Court of Appeals as it applies such stringent standard for waiver of a states' Eleventh Amendment Immunity not to prospective causes of actions but existing causes of action which become the liability of the state through a merger statute.

In the instant matter, Petitioner had raised a cause of action (claim) against the University of Illinois Athletic Association, an Illinois not-for-profit corporation, under 42 U.S.C., Section 1983, which existed prior to June 29, 1989, when the State of Illinois passed its special legislation occasioning the merger of the Athletic Association into the Board of Trustees of the University of Illinois stating unequivocally that the Board

of Trustees "shall be responsible and liable for all the liabilities and obligations" of the Athletic Association. Ill.Rev.Stat., ch.144, par. 28d(d)(4) (1989).

This is a case of first impression as to the application of Port Auth. and Atascadero to such a merger statute as to a pre-existing cause of action existing at the time of the merger. There are no decisions extending the strict standard of language of a state's waiver of its Eleventh Amendment Immunity retroactively to a cause of action that becomes the responsibility and liability of a state agency following a merger statute.

The key interpretation of the merger statute in question would seem to rest upon the language of said statute that "any claim existing or action or proceeding pending by or against" the Illinois Athletic Association "may be prosecuted to judgment as if the

merger had not taken place, or the surviving corporation may be substituted in its place." Ill.Rev.Stat., ch.144, par.28d(d)(4)(1989).

This language is specific that any claim or action, ie 42 U.S.C., Section 1983 action against the merging corporation Illinois Athletic Association which action is pending may be prosecuted in the name of the Athletic Association or the surviving corporation the Board of Trustees may be substituted. The strict language of Port Auth. and Atascadero to define a waiver of the Eleventh Amendment Immunity by a state as to consenting to prospective actions in federal court as applicable to this merger statute, the overwhelming implication by this merger statute as indicated by Port Auth. and Atascadero would be such a waiver.

The United States Court of Appeals for the Seventh Circuit found no waiver of

Eleventh Amendment Immunity in the merger statute. The idea that a state can wrest cases from the federal courts, shielding its own corporations from federal jurisdiction is wholly inconsistent with the rational of the Eleventh Amendment. The merger statute in question has a clearly substantive effect in transferring the pre-existing liability and obligations of the Athletic Association to the Board of Trustees and follows specifically the Illinois not-for Profit Corporation Act of 1986:

> (e) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations

> may be prosecuted to judgement as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any of such corporations shall be impaired by such merger or consolidation.

Ill.Rev.Stat., ch.32, par.111.50(e) (1986).

Therefore, the surviving corporation stands in the shoes of the disappearing corporation in every respect. Krull v. Celotex Corp., 61 F.Supp. 146, 148 (N.D.Ill.1985). When the terms of a statute are not specifically defined the words must be given their ordinary understood meanings as construed to the purposes and objectives of the statute. People v. Hicks, 101 Ill.2d 355, 371, 78 Ill.Dec. 354, 4652 N.E.2d 473 (1984).

By both their common meaning and their interpreted meaning in the case law the terms of the merger statute in question is a waiver of the Board of Trustees Eleventh Amendment Immunity, as surviving corporation.

The Board of Trustees by the merger statute agrees to be responsible and liable for any action or proceeding pending against the Illinois Athletic Association may be prosecuted to judgment either in the name of the Illinois Athletic Association or the Board of Trustees may be substituted in its place. A 42 U.S.C., Section 1983 cause of action proceeding was pending in the United States District Court for the Central District of Illinois. This is the existing action pending at the time of the merger statute in federal court proceedings. It is an action the Board of Trustees agreed to be responsible and liable for and agreed to prosecute to judgment

in the pending proceedings before the federal court, whether in the name of the Athletic Association or in its own name.

CONCLUSION

The United States Supreme Court should address the issue of whether or not the strict standard of waiver required for a state's waiver of its Eleventh Amendment Immunity in consenting to be subject to lawsuit in federal court applies to pre-existing lawsuits in federal court which becomes a liability of the state or its agency following a merger statute whose language makes the state or state agency responsible for such lawsuit's prosecution to judgment. The Petitioner asks this Court to grant a writ of certiorari to resolve this issue or in the alternative affirmatively apply the strict standard of Port Auth. and Atascadero as to the merger statute in

question in that such language of the merger statute by such overwhelming implication leaves no other reasonable construction that as to the pending lawsuit proceeding in federal court against the Illinois Athletic Association should be prosecuted to judgment by the Board of Trustees in accordance with the strict unequivocal language of the merger statute, Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989).

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 89-3414 and 90-1075

WILLIAM A. KROLL,

Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, an Illinois Public Corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 89 C 2014—**Harold A. Baker**, *Chief Judge.*

ARGUED JANUARY 9, 1991—DECIDED JUNE 17, 1991

Before WOOD, JR., COFFEY, and MANION, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* William Kroll, a former employee of the University of Illinois Athletic Association, took issue with the timing of and reasons for his discharge. He filed this suit on January 6, 1989, seeking damages from the Athletic Association, the Board of Trustees of the University of Illinois ("Board"), and Neale Stoner, individually and in his official capacity as director of the Athletic Association ("Stoner"). The district court concluded that the Board was entitled to eleventh amendment immunity and for this reason, as well as others not important to this decision, Kroll's complaint was dismissed on June 13, 1989, with leave to refile.

EXHIBIT A

When Kroll filed an amended complaint on July 18, 1989, he requested relief under 42 U.S.C. § 1983, as well as various state law theories, and named as defendants only the Athletic Association and Stoner. To his surprise, however, the Athletic Association no longer existed. On June 29, 1989, the Illinois General Assembly had passed special legislation allowing the Athletic Association, a not-for-profit corporation, to merge into the Board. Public Act 86-6, 1989 Ill. Legis. Serv. 299, 300-01 (West) (codified at ILL. REV. STAT. ch. 144, para. 28d). The two entities had thereafter entered into a merger agreement and filed articles of merger with the Illinois Secretary of State. On June 30, 1989, with the Secretary's issuance of a certificate of merger, the Board became the surviving corporation and the Athletic Association ceased to exist as a separate entity. ILL. REV. STAT. ch. 144, paras. 28d(c)(1), (d)(2); Plan of Merger ¶ 1.3.

The Board, now appearing as the surviving entity of the merger, reasserted its eleventh amendment immunity from suit. The district court rejected this argument by means of an order entered on October 4, 1989, and a supplemental order entered on December 12, 1989. These interlocutory orders were immediately appealable under the rationale set forth in *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), and as a result we have appellate jurisdiction to decide the question of law presented by the Board's timely notices of appeal. *Accord Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare*, 925 F.2d 844, 848-49 (5th Cir. 1991) (denial of motion to dismiss on eleventh amendment grounds is immediately appealable); *Schopler v. Bliss*, 903 F.2d 1373, 1376-78 (11th Cir. 1990) (same); *Dube v. SUNY*, 900 F.2d 587, 594 (2d Cir.) (same), *petition for cert. filed on other issues sub nom. Wharton v. Dube*, 59 U.S.L.W. 3278 (U.S. Oct. 9, 1990); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.) (same), *cert. denied*, 110 S. Ct. 501 (1989); *see also R.R. Donnelley & Sons Co. v. FTC*, No. 91-1447, slip op. at 4 (7th Cir. Apr. 29, 1991). *But see Libby v. Marshall*, 833 F.2d 402, 404-07 (1st Cir. 1987) (state officials sued in their official capacity for

injunctive relief cannot make interlocutory appeal from district court's denial of motion to dismiss on eleventh amendment grounds).[1]

The eleventh amendment to our Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. That language seems plain enough, but eleventh amendment jurisprudence has not precisely followed the text of the amendment. Heavily influenced by the judicially created doctrine of sovereign immunity, *see Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1872 (1990) [hereinafter *PATH*], the Supreme Court has broadened the amendment's language in some respects and narrowed it in others.

Today, eleventh amendment issues may arise whenever a private party files a federal lawsuit against a state, a state agency, or a state official. The effect of the amendment may differ, however, depending on the category of defendant. *Brunken v. Lance*, 807 F.2d 1325, 1328-29 (7th Cir. 1986). We therefore begin an eleventh amendment analysis by looking at the caption of the lawsuit.

Private party suits against a state are easy to identify and the analysis is relatively straightforward. Put simply, a state may claim immunity from suit in federal court and must be dismissed from the litigation unless there exists one of two well-established exceptions. *See id.*; *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). First, a state

[1] Neither of the parties before this court appears overly concerned that Kroll's amended complaint attempts to sue an entity that, as a technical matter, no longer exists. This interlocutory appeal may not be the proper place to address that anomaly, however, *see K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 855 (7th Cir. 1990) (discussing doctrine of pendent appellate jurisdiction), and, in any event, our decision on the eleventh amendment issue allows us to sidestep the matter.

may by unequivocal language waive the protections of the eleventh amendment and thereby consent to suit in federal court. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). Second, Congress may by unequivocal language use its enforcement powers under the fourteenth amendment to abrogate the states' eleventh amendment immunity. *See id.*; *see also id.* at 246 ("When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.") (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) [hereinafter *Pennhurst II*] (citing *Quern v. Jordan*, 440 U.S. 332 (1979)).

State agencies are treated the same as states. *See Pugh*, 438 U.S. at 781-82; *Gleason v. Board of Educ.*, 792 F.2d 76, 79 (7th Cir. 1986). Indeed, a state agency *is* the state for purposes of the eleventh amendment. *Davidson v. Board of Govs.*, 920 F.2d 441, 442 (7th Cir. 1990); *see also Pennhurst II*, 465 U.S. at 100 ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the eleventh amendment."). This is so, moreover, "regardless of the nature of the relief sought." *Id.*; *Gleason*, 792 F.2d at 79. The only new issue, therefore, is whether a particular defendant is really a state agency, i.e., whether an entity is more like " 'an arm of the State' " than a county or city. *Kashani v. Purdue Univ.*, 813 F.2d 843, 845 (7th Cir.) (quoting *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)), *cert. denied*, 484 U.S. 846 (1987); *see also Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n.54 (1978).

State officials present a more complicated analysis, but one that is set forth rather neatly in *Kentucky v. Graham*, 473 U.S. 159 (1985). Suits against state officials are sometimes permissible, and the key inquiry is whether the state is " 'the real, substantial party in interest.' " *Pennhurst II*, 465 U.S. at 101 (citing *Ford Motor Co. v. Department of Treas.*, 323 U.S. 459, 464 (1945)). Personal-capacity suits raise no eleventh amendment issues even

though an official might have the requisite nexus to the state in order for his or her actions to be labelled state action. *See Graham*, 473 U.S. at 165-67. A victory in such a suit, however, is a victory against only the individual defendant; an award of damages may be executed only against that official's personal assets. *Id.* at 165-66. Official-capacity suits, in contrast, are deemed to be against the " 'entity of which an officer is an agent.' " *Id.* at 165 (quoting *Monell*, 436 U.S. at 690 n.55). Accordingly, official-capacity suits for retrospective relief—i.e., money damages payable from the state treasury—generally implicate the eleventh amendment in the absence of a waiver by the state or a valid congressional override. *See Quern v. Jordan*, 440 U.S. 332 (1979). Under an exception to the general rule, however, official-capacity actions may not be barred by the eleventh amendment insofar as they request prospective relief—i.e., an injunction or a declaratory judgment and monetary damages that are "ancillary" to either. *Graham*, 473 U.S. at 169 n.18; *Ex Parte Young*, 209 U.S. 123 (1908).

The suit before the district court involved both an action against a state agency as well as personal-capacity and official-capacity actions against Stoner. Only the Board, however, has appealed and only the Board's immunity, therefore, need be addressed. This acknowledgment, in turn, leads us to *Cannon v. University of Health Sciences/Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983).

In *Cannon*, this court concluded that the Board was a state agency and, as such, that it was entitled to eleventh amendment immunity. *Id.* at 356-57. Kroll does not contest the validity of our analysis in *Cannon* (and we therefore do not revisit its holding)[2] but he does try to circumvent the case.

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[2] This determination requires a fairly fact-intensive analysis. *See Benning v. Board of Regents*, 928 F.2d 775, 777 (7th Cir. 1991) (citing *Soni v. Board of Trustees*, 513 F.2d 347, 352 (6th Cir. 1975) ("Each state university exists in a unique governmental context,

(Footnote continued on following page)

Kroll first cites *Quern*, a suit against state officials in which the Supreme Court observed that "a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 440 U.S. at 337. The Athletic Association, Kroll contends, raised funds solely from such sources as ticket sales, alumni donations, and sales of memorabilia; it did not accept money from the state treasury. In addition, the Athletic Association may have possessed insurance coverage from outside sources; Kroll believes that the potential proceeds from those policies would also comprise a source of income other than the state treasury. Kroll argues, therefore, that his judgment would not have to be satisfied by "public funds in the state treasury" and that the eleventh amendment therefore does not apply.

The flaw in this argument is that it assumes that the eleventh amendment does not apply unless and until a private party seeks a money judgment payable from the state treasury. The Supreme Court, however, faced this same assumption in *Cory v. White*, 457 U.S. 85 (1982), and flatly rejected it. As the Court made clear in *Cory*, the quoted language from *Quern* is relevant only to suits against state officials. *Id.* at 90-91. Here, in contrast, we have a suit against a state agency, and that agency must be dismissed from this litigation in the absence of one of the two previously noted exceptions. *Pugh*, 438 U.S. at 782. Kroll's argument may be relevant as to Stoner, therefore,

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[2] *continued*

and each must be considered on the basis of its own peculiar circumstances."), *cert. denied*, 426 U.S. 919 (1976)). Courts undertaking this analysis have produced decisions on both sides of the fence, *compare Kovats v. Rutgers*, 822 F.2d 1303 (3d Cir. 1987) (denying immunity), *with Schuler v. University of Minn.*, 788 F.2d 510 (8th Cir. 1986) (granting immunity), *cert. denied*, 479 U.S. 1056 (1987), but the bulk of them conclude that a state university is entitled to eleventh amendment immunity. *See Kashani*, 813 F.2d at 845.

but it is not relevant as to a state agency like the Board.[3] *Accord Thompson v. Illinois Dep't of Mental Health & Developmental Disabilities*, 753 F. Supp. 219, 221 (N.D. Ill. 1990).

Kroll also argues that the Board, as successor to the Athletic Association, cannot invoke the eleventh amendment because that defense was unavailable to the Athletic Association.[4] Even assuming, however, that the Athletic Association was not entitled to eleventh amendment immunity, a contention that we need not and do not address, Kroll's argument must still fail. The Board is still the Board, regardless of its status as a successor entity, and

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[3] Of course, the sources of income mentioned by Kroll may be relevant to the argument that the Board's ties to the public fisc are now insufficient to allow the Board to be characterized as a "state agency" for purposes of the eleventh amendment. Kroll has not raised this argument, however, and it is in any event unlikely that the funds received from activities formerly conducted by the Athletic Association would render significantly less substantial the Board's ties to the state treasury.

We would also note that *Cannon* rejected Kroll's argument insofar as it might apply to a state official. 710 F.2d at 357; *cf. In re San Juan Dupont Plaza Hotel Fire Litig.*, 888 F.2d 940, 945 (1st Cir. 1989); *Markowitz v. United States*, 650 F.2d 205, 206 (9th Cir. 1981) (per curiam).

[4] As support for this argument, Kroll cites only *Robinson v. KFC Nat'l Mgmt. Co.*, 171 Ill. App. 3d 867, 525 N.E.2d 1028, 121 Ill. Dec. 721 (1st Dist.) (successor corporation could not invoke a defense that was unavailable to its predecessor corporation), *appeal denied*, 122 Ill. 2d 594, 530 N.E.2d 264, 125 Ill. Dec. 236 (1988). *Robinson*, however, cannot provide a basis for concluding that Illinois has waived its eleventh amendment immunity. As an initial matter, it is far from clear whether an Illinois appellate court may effect a waiver of the state's immunity. *See generally* ILL. CONST. art. 13, § 4. But even if an Illinois appellate court could accomplish such a result, it has not done so here. *Robinson* says absolutely nothing about sovereign immunity, either common law or constitutional, and, therefore, cannot satisfy the requirement that waivers of eleventh amendment immunity are effective only if they use unequivocal language.

in the absence of waiver or congressional abrogation must be accorded the respect due a state under the eleventh amendment. Kroll will be successful, therefore, only if he can establish one of these two exceptions.

We take the easier analysis first: this is not a case where Congress has abrogated the states' eleventh amendment immunity. Indeed, Kroll's only federal claim, and therefore the only claim that could possibly satisfy this exception, is his request for relief under 42 U.S.C. § 1983. The Supreme Court, however, long ago dispelled the notion that section 1983 abrogated the states' eleventh amendment immunity,[5] and suits filed under that statute must still pay heed to the eleventh amendment.

The only other possibility is waiver. We can give effect to a waiver, however, " 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' " *PATH*, 110 S. Ct. at 1873 (quoting *Atascadero*, 473 U.S. at 239-40). And here, the only plausible basis for that type of waiver is a provision of the special legislation that allowed the Board to merge with the Athletic Association. In its entirety, that provision states:

> The Board of Trustees of the University of Illinois shall be responsible and liable for all the liabilities and obligations of each of the corporations so merged; and any claim existing or action or proceeding pending by or against either of such corporations may be prosecuted to judgment as if such merger had not taken place, or the surviving corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of either of such corporations shall be impaired by such merger.

ILL. REV. STAT. ch. 144, para. 28d(d)(4).

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[5] *See Quern*, 440 U.S. at 341 (section 1983 does not "override the traditional sovereign immunity of the States"); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989).

The district court correctly identified a waiver in that statutory language, but as we view it that waiver is not effective in this eleventh amendment context. In a series of opinions of which *PATH* is the most recent, the Supreme Court has continually emphasized the very stringent nature of the standard used to determine whether a state has waived its eleventh amendment immunity. In *PATH*, for example, New York and New Jersey consented " 'to suits, actions, or proceedings of any form or nature at law, in equity or otherwise.' " 110 S. Ct. at 1873 (quoting N.J. STAT. ANN. § 32:1-157; N.Y. UNCONSOL. LAWS § 7101 (McKinney)). That language was broad, said the Supreme Court, but was nonetheless ambiguous with respect to eleventh amendment immunity because it did not specifically indicate the states' willingness to be sued in federal court. *Id.* In *Atascadero*, a provision of the California Constitution provided that " '[s]uits may be brought against the State in such manner and in such courts as shall be directed by law.' " 473 U.S. at 241 (citing CAL. CONST. art. III, § 5). Again, the Supreme Court held that this language was insufficient because it did not "specify the State's intention to subject itself to suit in *federal court*." *Id.*

Here, Illinois law provides for a limited relaxation of the general rule that tort suits against the Board may be pursued only in the Illinois Court of Claims.[6] The question then becomes, "How far does this waiver extend?" Kroll argues that the legislature had notice of his claim in federal court and that the broad language of the merger statute evidences no objection to his suit. A state's failure to object, however, is not a waiver of eleventh amendment

[6] ILL. REV. STAT. ch. 37, para. 439.8 (conferring exclusive jurisdiction in Illinois Court of Claims over tort suits against the Board that would lie against a private person or corporation in a civil suit); *id.* ch. 144, para. 22 ("any suit against the Board based upon a claim sounding in tort must be filed in the Court of Claims"). Indeed, this court recently used a similar rationale to affirm the dismissal of tort claims brought against the governing body of Northern Illinois University. *See Benning*, 928 F.2d at 777-78.

immunity. There exists, moreover, a reasonable alternative construction of the statute that would not involve a waiver of eleventh amendment immunity. *See Atascadero*, 473 U.S. at 241. Specifically, the legislature might have intended the merger statute to allow actions only in other Illinois state courts, and a state does not waive its eleventh amendment immunity by consenting to suit only in its own courts. *See, e.g., PATH*, 110 S. Ct. at 1873.

If the statutory language cited from *PATH* and *Atascadero* does not meet the Supreme Court standard, then it is difficult to see how the language in the Illinois statute can satisfy that test. At best, the evidence of waiver is ambiguous; the language might consent to suit in federal court, but then again it might not. And under these circumstances, federal courts are loath to find a waiver; the "vital role of the doctrine of sovereign immunity in the federal system" demands that we err, if at all, on the side of immunity. *See Pennhurst II*, 465 U.S. at 99. For purposes of the eleventh amendment, therefore, an ambiguous waiver is no waiver at all.

The Board was entitled to claim immunity under the eleventh amendment and, as such, the district court's order and supplemental order must be and are hereby REVERSED and REMANDED with instructions to dismiss the Board from this suit.[7]

The parties shall bear their own costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[7] Our analysis would also support an alternative basis for dismissing this action. This court has jurisdiction only by virtue of 42 U.S.C. § 1983, the remaining state law claims being advanced under the theory of pendent jurisdiction. A state agency with eleventh amendment immunity, however, is not a "person" within the meaning of section 1983. *Will*, 491 U.S. 58.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: June 17, 1991

Honorable HARLINGTON WOOD, JR., Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Nos. 89-3414 and 90-1075

WILLIAM A. KROLL,
Plaintiff-Appellee,
vs.

BOARD OF TRUSTEES OF THE UNIVERSITY
OF ILLINOIS, an Illinois Public Corporation,
Defendant-Appellant.

Appeals from the United States District Court for the
Central District of Illinois, Danville Division
No. 89 C 2014, Judge Harold A. Baker

These causes were heard on the record form the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed

from be, and the same are hereby, REVERSED and REMANDED, with instructions to dismiss the Board from the suit, the parties shall bear their own costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 22, 1991

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Nos. 89-3414 and 90-1075	)	Appeal from the United States District Court for the Central District of Illinois, Danville Division.
WILLIAM A. KROLL, Plaintiff-Appellee, vs. BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, an Illinois Corporation, Defendant-Appellant.	)	No. 89 C 2014 Harold A. Baker Chief Judge

O R D E R

On consideration of the petition for rehearing with suggestion for rehearing in banc filed in the above-entitled cause by plaintiff-appellee on July 1, 1991, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

EXHIBIT B

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing in banc be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

WILLIAM A. KROLL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 89-2014
	)	
NEALE R. STONER, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the court for hearing on the defendants' motion to dismiss the first amended complaint. The plaintiff appears through Marvin Gerstein. The defendants appear through Edward Rawles.

The defendants' motions are denied with the exception that the motion to dismiss the plaintiff's claim for breach of contract is allowed. The plaintiff is given leave to plead over within twenty-one (21) days.

The defendants' motion for Rule 11

sanctions is denied. The law is far from clear on the subject presented in the motions. In fact, Mr. Rawles candidly stated he thought it was a question of original impression. I agree. I think it is a novel question, and Rule 11 is not intended to dissuade lawyers from presenting novel theories or pursuing innovative remedies.

The parties are directed to file a discovery schedule calendar with the court within fourteen (14) days of this date.

The cause is allotted for further status hearing by telephone conference January 3, 1990, at 9:00 a.m

ENTER this 4th day of October, 1989.

HAROLD A. BAKER
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

WILLIAM A. KROLL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 89-2014
	)	
NEALE R. STONER, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW
AND ORDER

This is an action based on 28 U.S.C., Section 1343 and 42 U.S.C., Section 1983. Plaintiff's 1983 action is based on an alleged violation of First Amendment rights.

The plaintiff, William Kroll, served as strength coach for the Athletic Association of the University of Illinois. He alleges that Neale Stoner, the Association's Athletic Director, refused to reappoint him as strength coach because Kroll openly questioned certain conduct and hiring practices of the

Association and the football team. The plaintiff seeks $50,000 actual damages, 1.8 million in consequential and other damages, and 2 million dollars in punitive damages.

Count I of the plaintiff's complaint is a Section 1983 action against Neale Stoner and the Athletic Association. Counts II and III are breach of contract and retaliatory discharge claims against the Athletic Association.

Subsequent to the filing of the complaint, the Board of Trustees of the University of Illinois and the Athletic Association of the University of Illinois merged. After the merger, only the Board of Trustees survives.

In an order dated October 4, 1989, the court denied the Board's and Stoner's motions to dismiss Count I. The defendants argued that the Eleventh Amendment barred the

plaintiff's action in federal court under the rule announced in Cannon v. University of Health Sciences, 710 F.2d 351 (7th Cir. 1983).

DISCUSSION

In Cannon, the Seventh Circuit held that the University of Illinois is an arm of the State for Eleventh Amendment purposes. Id. at 357. Thus, Section 1983 actions against the University or its officials are barred from federal court unless the State consents. Edelman v. Jordan, 415 U.S. 651, 678 (1974).

Article I, paragraph 1.6(B) of the Articles of Merger states:

> The Board of Trustees of the University of Illinois shall henceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged; and any claim existing or action or proceeding pending by or against either of such corporations may be prosecuted to judgment as if such merger had not taken place . . . .

The plain language of the Articles of Merger

state that pending claims may be prosecuted to judgment as if there had been no merger and that the University of Illinois assumed responsibility for any judgments obtained against the Athletic Association. The present case was "pending" when the merger occurred; the plaintiff filed suit on January 6, 1989, and the merger occurred on June 30, 1989. The court cannot imagine a clearer indication of State consent.

Thus, defendants' motions are hereby denied.

ENTER this 12th day of December, 1989.

_____

HAROLD A. BAKER
CHIEF UNITED STATES
DISTRICT JUDGE